No. 22555

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK RAY CULBERTSON,

Petitioner and Appellant,

vs.

STATE OF CALIFORNIA,
et al.,

Respondents and Appellees.

On Appeal From the United States District Court
For the Southern District of California

APPELLANT'S OPENING BRIEF

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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STATEMENT OF THE CASE

Petitioner was convicted in the Municipal Court of the San Diego Judicial District of exhibiting obscene films in violation of Section 311. 2 of the Penal Code of California on August 16, 1965 after a trial before a jury. Prior to the trial, the court viewed the films and held them to be obscene as a matter of law.

In November, 1965, sentence was suspended and petitioner was granted probation of one year and said period has expired.

Petitioner appealed to the Appellate Department of the Superior Court of the San Diego County and his conviction was affirmed. Certification to the Court of Appeal of the Fourth Appellate District was denied. In June, 1966, while still on probation, petitioner filed a Writ of Habeas Corpus in the United States District Court (# 3585) Southern District of California, Southern Division alleging that he had

suffered an unlawful search and seizure in violation of the Fourth Amendment of the Constitution of the United States and that the material seized was constitutionally protected and that he was denied freedom of speech and press under the First Amendment of the Constitution of the United States and further that defendant suffered self incrimination and was denied due process of law. On September 14, 1966 said United States District Court dismissed the application for a Writ of Habeas Corpus. Petitioner did not appeal from this order.

On October 3, 1967, petitioner filed a Writ of Error Coram Nobis alleging the above facts and that until said date petitioner was unaware that the United States District Court did not view the exhibits submitted in behalf of petitioner at the time the Writ of Habeas Corpus was denied and that the order dismissing said Writ was therefore based on insufficient evidence and further that said United States District Court did not grant petitioner a hearing and that petitioner was entitled to a Writ of Coram Nobis for the reasons that an error of law had taken place and that the films were not obscene either at the time of his conviction in the Municipal Court of the San Diego Judicial District, citing Jacobellis v. Ohio, 378 U.S. 184; and Roth v. United States, 354 U.S. 476 or under the later decision of the United States Supreme Court in Redrup v. New York, 386 U.S. 767 and companion cases (1967). Petitioner also alleged that the result of said conviction persists to this date in that subsequent convictions under the California Penal Code will carry a heavier penalty as a felony and his civil rights as a citizen of the United States would be lost. Petitioner also pointed out that a Writ of Error Coram Nobiswill not lie in the State of California if he seeks redress by reason of an error of law rather than a mistake of fact.

On November 6, 1967, the City Attorney of the City of San Diego filed a Notice of Motion to Dismiss said Writ of Error Coram Nobis upon the ground that the petition does not invoke the jurisdiction of the United States District Court alleging that said Writ could not be used as a substitute for a Writ of Habeas Corpus or as a collateral writ of error between State and Federal jurisdictions. On November 21, 1967 said District Court dismissed the petition for a Writ upon the ground that petitioner was alleging error in a civil action and that coram nobis was not available for such a purpose under Federal Rule 60(b) and also that the Writ could not be treated as one for habeas corpus because petitioner was no longer in custody and upon the further ground that petitioner was seeking to have the court apply concepts of obscenity which were not in existence at the time of his conviction and give retrospective effect to the Redrup decision. Petitioner filed a Notice of Appeal and the District Court granted a Certificate of Probable Cause which is on file in this appeal.

SPECIFICATION OF ERRORS

1. The court erred in dismissing the petition for a Writ for lack of jurisdiction.

2. The Court erred in holding that the Writ is not available under Rule 60(b) of the Federal Rules of Procedure.

3. The Court erred in holding that the material was not constitutionally protected under the decisions in effect at the time the Writ of Habeas Corpus was filed.

4. The Court erred in failing to apply the concepts of obscenity as set forth in Redrup v. New York.

5. The Court erred in holding that a Writ of Habeas Corpus is not available because petitioner is not in custody.

ARGUMENT

I

THE WRIT OF ERROR CORAM NOBIS IS AVAILABLE TO PETITIONER EVEN THOUGH IT IS FILED IN A CIVIL ACTION BECAUSE PETITIONER HAS SUFFERED A CRIMINAL CONVICTION.

In the recent case of In re Gault, 387 U. S. 1, the United States Supreme Court has extended constitutional guarantees to proceedings in juvenile cases which heretofore have be considered "civil" actions although the proceedings grew out of criminal offenses committed by minors. The fiction that these proceedings were not criminal in nature was formulated for the purpose of protecting minors from suffering liabilities by reason of a criminal conviction. The Court states in the Gault case:

> "It would be entirely unrealistic to carve out of the Fifth Amendment all statements by juveniles on the ground that these cannot lead to 'criminal' involvement. In the first place, juvenile proceedings to determine 'delinquency' which may lead to commitment to a State Institution must be regarded as 'criminal' for purposes of the privilege against self-incrimination. To hold otherwise would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings. . . . It is incarceration against one's will whether it is called 'criminal' or 'civil'. And our Constitution guarantees that no person shall be 'compelled' to be a witness against himself when he is threatened with deprivation of his liberty - a command which this court

has broadly applied and generously implemented in accordance with the teaching of the history of the privilege and its great office in mankind's battle for freedom. " (Citing Miranda v. Arizona, 384 U. S. 436 and other cases.)

In line with the reasoning of the United States Supreme Court in Gault and looking at the substance rather than the form, it is obvious that the filing of a Writ of Error Coram Nobis in the case at bench involves criminal proceedings and especially, as in this case, where petitioner has suffered criminal conviction. It would be contrary to the basic tendencies of the Federal Courts to extend relief in criminal cases if so important a Writ could be dismissed on the minimal ground that it is a "civil" proceeding. It has been held that rule 60(b) does not apply to criminal proceedings and petitioner alleges this exception to rule 60(b) extends to cases which are criminal in nature, Sanchez v. Tapia v. U. S., 227 F. Supp. 35, affirmed 338 F. 2d 416, certiorari denied 380 U. S. 957; U. S. v. Marcello, 210 F. Supp. 892, affirmed 328 F. 2d 961, certiorari denied 377 U. S. 992.

With regard to Habeas Corpus, the fact that petitioner is no longer in custody is immaterial since the result of his conviction persists and the Federal Court will not suffer him to be without a remedy if, as in the case at bench, he has been denied fundamental constitutional rights for which he is entitled to redress. Morgan v. United States, 346 U. S. 562; Sanders v. United States, 373 U. S. 1.

II

PETITIONER IS ENTITLED TO RELIEF WHETHER BY WRIT OF CORAM NOBIS OR HABEAS CORPUS.

In Fay v. Noia, 372 U.S. 391, petitioner and two other persons were convicted of murder. The petitioner did not appeal as his co-defendants did. He applied to the State court for a coram nobis review of his conviction but this was denied because of his failure to appeal. He then filed a Writ of Habeas Corpus in a United States District Court which was denied. The Court states that after State courts had dismissed Federal questions on the merits against the petitioner, he could apply to the Federal Court for habeas corpus and relitigate the question and that conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest Federal policy that constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review. The court further held that Federal Court jurisdiction in a habeas corpus proceeding is conferred by the allegation of an unconstitutional restraint, and it is not defeated by anything that may occur in the State proceeding and that forfeiture of remedy does not legitimize the unconstitutional conduct by which his conviction was procured.

Appellant, in the case at bench, alleges that he was denied fundamental constitutional rights which cannot be defeated by his failure to appeal from the denial of the Writ of Habeas Corpus in the Court below.

In Lark v. U.S. (1965) 251 F. Supp. 471, petitioner sought to set aside a 1925 federal conviction. The court and the Government conceded that the court had jurisdiction despite failure to appeal or bring writs over this extended period of time.

CONCLUSION

In view of the foregoing, appellant prays that the order of the United States District Court dismissing the Writ of Error Coram Nobis be reversed.

Respectfully submitted,

HARRY ELLMAN and
MELVYN B. STEIN

By /s/ HARRY ELLMAN

Attorneys for Appellant.

CERTIFICATION

I certify that in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing Brief is in full compliance with those rules.

/s/ HARRY ELLMAN